courts. If, on the other hand, all State courts are held to have this concurrent jurisdiction, how can a consistent administration of the law be accomplished by verdicts of seven jurors in Virginia, nine of twelve in Ohio, ten of twelve in Washington, and by the judge himself if the jury disagrees in Louisiana?

T. R., Jr.

CONSTITUTIONAL LAW—POLICE POWER—REGULATION AND FIXING OF RATES—In view of the modern tendency toward governmental control of corporate enterprises and the increasing number of statutory restrictions on business, the recent decision in the case of the *German Alliance Insurance Company* v. *Lewis*[1] is very interesting. In that case the Supreme Court of the United States held that a statute passed by the legislature of Kansas fixing the rates to be charged by all stock insurance companies operating in that State was valid and not repugnant to the due process clause of the Fourteenth Amendment to the Federal Constitution.

In the early stages of the English law, especially from the middle of the fourteenth century to the early part of the eighteenth century, the attempts by the State to regulate private employments and private trade were manifold. In this regard the growth of the English law has seen a change until its present condition is one of virtually complete non-interference. On the other hand, the growth of the law respecting the control of public and quasi-public employments has been from a condition of comparative freedom to one of complete and adequate supervision and control.[2]

In this country the early history of such legislation is brief. Owing to the great financial distress and commercial uncertainty incident to the Revolution attempts were made in the various States to control prices, both of labor and commodities, by statutes. The futility of such legislation became at once evident, however, and the statutes were repealed almost immediately, without ever having been enforced.[3] Upon the adoption of the Constitution, the question of the regulation of business became, in a great number of cases, a constitutional one. Under the Constitution the power of the States with regard to police regulations within their respective boundaries is supreme. Under the exercise of this power private interests must be made subservient to the general interest and welfare of the community,[4] provided, however, that the exercise of said power

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[1] 34 Sup. Ct. Rep. 612 (1914).

[2] Stickney,—State Control of Trade and Commerce, p. 88.

[3] Stickney,—State Control of Trade and Commerce, Chap. III.

[4] Slaughter House Cases, 83 U. S. 36 (1872). As to the extent of the police power, Redfield, J., in Thorpe v. R. R., 27 Vt. 140 (1855), p. 149, says: "The police power of the state extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state. According to the maxim, *Sic utere tuo ut alienum non*

must not conflict with the Fourteenth Amendment to the Constitution.[5]

The limit to the exercise of the police power with respect to the fixing of rates and charges lies in the distinction between private property and private employments on the one hand, and public and quasi-public employments and property used in such employments, on the other hand. The right of citizens to pursue ordinary callings and vocations upon their own terms is a part of their right of liberty and property, and any law which abridges or prevents this privilege is obnoxious to the Constitution.[6] On the other hand it has long been well established that the business of railroad companies as common carriers is of such a public nature as to subject them to legislative control as to rates and freights.[7] The principle has also been extended to include the business of street railways,[8] ferries,[9] bridges,[10] turnpike roads,[11] telegraph companies,[12] telephone companies,[13] gas companies,[14] water companies,[15] irrigation projects,[16]

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laedas, which is of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others. . . . By this general police power of the state, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general health, comfort and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."

[5] *Ex parte* Dickey, 144 Cal. 234 (1904), (Act limiting the compensation which an employment agent might receive held unconstitutional); People v. Coler, 166 N. Y. 1 (1901), (Statute providing that laborers on public works should be paid the prevailing rate of wages held void); Street v. Electrical Supply Co., 160 Ind. 338 (1902), (Act providing that unskilled labor employed on any public work of the state, counties, *etc.*, should receive not less than twenty cents an hour held repugnant to the Fourteenth Amendment).

[6] Allegeyer v. Louisiana, 165 U. S. 578 (1897).

[7] Chicago, C. B. & Q. R. Co. v. Iowa, 94 U. S. 155 (1877); Peik v. Chicago & N. W. R. Co., 94 U. S. 164 (1877).

[8] Commonwealth v. Inter. Con. Street R. Co., 187 Mass. 436 (1905); Buffalo East Side R. Co. v. Buffalo Street R. Co., 111 N. Y. 132 (1888).

[9] Parker v. Met. R. Co., 109 Mass. 506 (1872); State v. Hudson County, 23 N. J. L. 206 (1852),—affirmed in 24 N. J. L. 718 (1854).

[10] Canada So. R. Co. v. International Bridge Co., 8 Fed. Rep. 190 (1881).

[11] Covington L. Turnpike Co. v. Sanford, 164 U. S. 578 (1896).

[12] Western Union Tel. Co. v. Myatt, 98 Fed. Rep. 335 (1899).

[13] Central Union Tel. Co. v. Falley, 118 Ind. 194 (1880),—affirmed in 118 Ind. 598 (1880).

[14] New Memphis Gas & Light Co. v. Memphis, 72 Fed. Rep. 952 (1895); Rushville v. Rushville Nat. Gas Co., 132 Ind. 575 (1892).

[15] Spring Valley Water Co. v. Schottler, 110 U. S. 347 (1884); Tampa v. Tampa Waterworks, 45 Fla. 600 (1903),—affirmed in 199 U. S. 241 (1903).

[16] San Diego Land and Town Co. v. Jasper, 89 Fed. Rep. 274 (1898).

wharfage,[17] milling,[18] log booming and salving.[19] It will be noticed that in each of the foregoing cases the business is one in which the property employed is devoted to a public use; or the property has been acquired under the right of eminent domain; or the business is conducted under a franchise; or there is a holding out to do business with the public.

A decided extension of the power to regulate rates by legislative enactment was made by the decision in the case of *Munn* v. *Illinois*.[20] In that decision the Supreme Court laid down for the first time the proposition that where the circumstances surrounding a particular business, or its character, make it a "virtual monopoly", the State can regulate the conduct of that business. As a basis for their decision the court invoked the principle of the common law that when private property is "affected by a public interest it ceases to be *juris privati* only" and so is subject to regulation by the State. This regulation the Supreme Court held might extend to the fixing of rates. Since that decision it has become well established that the right exists in the State to regulate the charges to be made by those whose business is "affected by a public interest".[21] The phrase "affected by a public interest" is somewhat vague but appears to be used as descriptive of a business which is indispensable to the comfort or convenience of the whole community, or which so directly affects such a large proportion of the people that the public prosperity and welfare may be considered to depend in some measure upon its being conducted upon fair and just principles and without unreasonable exactions.[22]

In its recent decision in the German Alliance Insurance Company Case, the Supreme Court has re-affirmed the principle that the police power of a State extends to a regulation of the rates or charges to be made in a business "affected by a public interest".[23]

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[17] Ouachita, *etc.*, Packet Co. v. Aiken, 121 U. S. 444 (1887).

[18] State v. Edwards, 86 Me. 102 (1894); West v. Rawson, 40 W. Va. 480 (1895).

[19] Henry v. Roberts, 50 Fed. Rep. 902 (1892); West Branch, *etc.*, Exchange v. Fisher, 150 Pa. 475 (1892); Underwood, *etc.*, Co. v. Boom Co., 76 Wis. 76 (1891).

[20] 94 U. S. 113 (1876). In this case seven warehouses, controlled by thirty people, had practical control of all the grain shipped through Chicago from the Northwest to eastern points.

[21] Budd v. New York, 143 U. S. 517 (1891); Brass v. North Dakota, 153 U. S. 391 (1893). In the latter case the doctrine of the Munn Case was extended to the regulation of grain warehouses where there was not a present monopoly or possibility of a future monopoly. It is also worth while to note that it was strongly contended by Field, J., dissenting in the Munn Case, and by Brewer, J., dissenting in the case of Budd v. New York, that the right to regulate rates is dependent upon showing that the property employed in the business in question has been *devoted to a public use*. See also on this point, Savage, J., in the case of Brown v. Gerald, 100 Me. 351 (1905).

[22] Black on Constitutional Law, 3rd ed., p. 412.

[23] Lamar, J., delivered a dissenting opinion, based on the same grounds

In that respect the decision is unquestionably sound. It may be questioned, however, whether the holding the insurance business to be "affected by a public interest" was not an unwarranted extension of the operation of the principle.[24] In the three leading cases establishing the principle[25] the Supreme Court seemed to be influenced to some extent, at least, by the characteristics of the businesses involved, *viz.*, the fact that they were virtual monopolies;[26] their relation to the business of transportation and to the business of common carriers. None of these characteristics are present in the case of the insurance business and the court on this point of the leading case seems to have based its decision on the huge ramifications of the insurance business as a whole, the large property interests involved, and the resulting necessity for control for the protection of the ordinary citizen. The court recognized, as it always has, that no general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the prices of commodities or services, or interfere with the freedom of the contract. Notwithstanding, the court held the insurance business to be subject to regulation to the extent of fixing its rates. Was it justified in so holding?

Since the case of *Paul* v. *Virginia*[27] it has been established that the carrying on of insurance business is not commerce.[28] It would seem, by the weight of opinion, that an insurance policy is a personal contract of indemnity.[29] It is clear, however, that the insur-

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as the opinions of Field, J., in the Munn Case, and Brewer, J., in the case of Budd v. New York (see n. 21, *supra*). White, C. J., and Van Devanter, J., joined in the dissent.

[24] An important factor which influenced the court in the case of Munn v. Illinois to enunciate the principle affirmed and extended by our leading case was the English case of Alnutt v. Ingles, 12 East, 527 (Eng. 1810). In that case warehouses which enjoyed a virtual monopoly by reason of certain statutes were held to be so invested with a public interest as to be subject to government regulation. It is interesting to note, however, that Lord Ellenborough, during the argument in that case, said: "The business of insurances and counting houses may be carried on elsewhere, and therefore do not apply." It is clear, therefore, that Lord Ellenborough did not consider the insurance business of his time to be so affected by a public interest as to justify regulation of its rates.

[25] Munn v. Illinois, 94 U. S. 113 (1876); Budd v. New York, 143 U. S. 517 (1891); Brass v. North Dakota, 153 U. S. 391 (1893).

[26] This statement does not apply to the case of Brass v. North Dakota, where there was no present monopoly, or even danger of a future monopoly. Nevertheless, on the authority of the Munn Case, the Supreme Court held that conducting a warehouse, even though primarily for the owner's private enterprise, was a business "affected by a public interest."

[27] 8 Wall. 168 (1868).

[28] Hooper v. California, 155 U. S. 648 (1895); N. Y. Life Ins. Co. v. Deer 86 Tex. 250 (1893).

[29] Hooper v. California, 155 U. S. 648; N. Y. Life Ins. Co. v. Deer Lodge County, 231 U. S. 495 (1913); Amer. Surety Co. v. Shallenberger, 183 Fed. Rep. 636 (1910).

ance business is considered of such importance that a State may regulate or restrict the formation of contracts of insurance within its borders;[30] and there is authority for the proposition that fire insurance is a business affected by a public interest.[31] But until the decision in our leading case no court had gone so far as to permit rate fixing. Indeed, a recent decision in a federal court held a statute passed by the legislature of Nebraska fixing the maximum charges and rates of premium to be charged by all surety companies operating in that State, to be void because repugnant to the Fourteenth Amendment to the Constitution.[32]

It is clear from the foregoing review of the decisions that the Supreme Court has gone considerably further than ever before in holding that the business of insurance is so much affected by a public interest as to justify a State, in the exercise of its police power, in regulating the rates or premiums which shall be charged for insurance. As to the wisdom and justification for such holding we will quote from an opinion of the Supreme Court in an earlier opinion: "Though reasonable doubts may exist as to the power of the legislature to pass a law or as to whether a law is calculated to promote the health, safety or comfort of the people, or to secure good order," —[in other words, whether it is within the legitimate exercise of the police power]—"we must resolve them in favor of that department of the government. . . . The question in each case is whether the legislature has adopted the statute in the exercise of a reasonable discretion, or whether its action is a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class".[33]

R. M. G.

CRIMINAL PROCEDURE—EXTRADITION—SUFFICIENCY OF PAPERS —The melodramatic escape of Harry K. Thaw from Matteawan, N. Y., where he was confined as an insane person, in accordance with a decree of custody following a verdict of "not guilty of murder but insane," and his subsequent capture in New Hampshire have produced a new situation in interstate extradition proceedings. When the State of New York claimed the right of extradition, under the Constitution[1] of the United States, the governor of New

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[30] Equitable Life Assur. Soc. v. Clements, 140 U. S. 226 (1891); Hooper v. California, 155 U. S. 648 (1895); Com. v. Vrooman, 164 Pa. 306 (1894).

[31] No. Amer. Ins. Co. v. Yates, 214 Ill. 272 (1905); State v. Fireman's Ins. Co., 74 N. J. Eq. 372 (1908); People v. Loew, 44 N. Y. Supp. 42; Com. v. Vrooman, 164 Pa. 306 (1894).

[32] Amer. Surety Co. v. Shallenberger, 183 Fed. Rep. 636 (1910).

[33] Brown, J., in Holden v. Hardy, 169 U. S. 391 (1898).

[1] Art. IV, Sec. 2: "A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."